Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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INDEX TO APPENDIX

PAGE

Opinion, Supreme Court of Kentucky 1–25

Order Granting Stay of Execution of Mandate..... 26

Charges Made by Kentucky Bar Association Against Respondent, Donald M. Heavrin.....27–30

Rule 3.160(a) of the Supreme Court of Kentucky, Initiation of Disciplinary Case..... 30

Opinion of Trial Committee, June 1977.....31–33

Report and Findings of Fact and Conclusions of Trial Committee, Jan. 1978.....34–36

Mandate from Supreme Court of Kentucky.....37–38

Opinion of Jefferson Circuit Court, Judge James Hubbs, in Citizens Fidelity Bank & Trust Co. v. Donald M. Heavrin, et al., #174698, Jefferson Circuit Court, Chancery Branch, Second Division....38–39

Page 6, Findings of the Board of Governors, Kentucky Bar Association.....40–41

Letter dated August 15, 1973, to the Petitioner, Donald M. Heavrin, from the Kentucky Bar Association 41–43

Pages 1, 2, 3, 4 and 5 of the Kentucky Bar Association's Brief before the Supreme Court of Kentucky 44–48

First and Second Paragraphs of Page 3, Response to Petition for Rehearing by Kentucky Bar Association 48–49

Pages 98 and 99 and 100 of Transcript of Testimony before Trial Committee, March 10, 1977.....49–50

Pages 1, 2, 3 & 4 of Ky. Bar Association's Response to Notice for Review 51–54

PAGE

Letter dated June 21, 1976, to Leslie Whitmer, KBA, from petitioner's attorney (petitioner's response to charges) 55–58

Opinion from Kentucky Law Summary, 26 K.L.S. 2, *Ky. Bar Association* v. *Burroughs* 58–62

Letter dated September 12, 1975, to Leslie Whitmer, KBA, from petitioner's attorney 62–63

Answer of Donald M. Heavrin, Kentucky Bar Association v. Donald M. Heavrin, Supreme Court of Kentucky, dated October 7, 1976 64–68

Pages 13, 17, 19, 20, 28, 32 and 47 of Heavrin's testimony before Trial Committee on August 30, 1977..68–71

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SUPREME COURT OF KENTUCKY

78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

PER CURIAM

In this disciplinary proceeding the Kentucky Bar Association charged Donald M. Heavrin, a Louisville attorney and a member of the Kentucky Bar Association, with seven counts of unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. A trial committee consisting of three members filed an opinion with one member of the committee filing a dissenting opinion recommending that the Board of Governors dismiss the charges because Heavrin alleged the Kentucky Bar Association had not proceeded properly under the provisions of former RAP 3.160.[1] On July 16, 1977, the Board of Governors sent the case back to the trial committee to make recommendations on the merits. Then on January 2, 1978, the trial committee recommended dismissal of all charges by unanimous vote. Subsequently on March 18, 1978, the Board of Governors, after full consideration, voted on the issue of guilt or innocence. Ten members of the Board found Heavrin guilty on Counts IV through VII and recommended that he be suspended

1 *"The Initiation of Disciplinary Cases*

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has 15 days to acknowledge receipt of the complaint or respond to the merits." Amended Oct. 14, 1977, effective Jan. 1, 1978. (No substantial change in this section.)

from the practice of law in this Commonwealth for a period of two years. It was further recommended by the Board of Governors that Heavrin pay the costs of these proceedings. One member found him not guilty. Thereafter Heavrin filed in this court a notice for review and brief.

This court has reviewed the record including the proceedings of the Jefferson Circuit Court entitled "Citizens Fidelity Bank and Trust Co. v. Donald M. Heavrin," No. 176498, which by stipulation the parties made a part of this record all of the testimony and proceedings of the Jefferson Circuit Court.[2]

In order to place the issues in proper perspective, this court is of the view that the findings of fact and conclusions by the Board of Governors very aptly cuts through the voluminous and prolix testimony presented before the trial committee including the evidence presented in Civil Action No. 176498 styled "Citizens Fidelity Bank and Trust Co. v. Donald M. Heavrin."[3] The finding of facts and conclusions of the Board of Governors are as follows:

FACTS

"The facts of the case are drawn from the proceedings of the Jefferson Circuit Court, entitled 'Citizens Fidelity Bank and Trust Company v. Donald M. Heavrin, No. 176498'. By stipulation, the parties made a part of this record all of the testimony and proceedings of the Jefferson Circuit Court.

Sometime in March, 1972, Heavrin was employed and undertook to represent James D. Donoghoe, a former member of the association, on a charge of uttering a worthless check in the amount of $3,000.00. It appears that Donoghoe had some bizarre arrangement with certain clients in Pennsylvania to use $42,500.00 of a settlement he had made for them in a personal injury case. Donoghoe was to use the $42,500.00 in a real estate deal upon the payment of 9% interest to the client, subject to the right of the client to call upon Donoghoe from time to time for payment. The $3,000.00 which gave rise to the prosecution represented a check by Donoghoe to these clients which bounced. A Warrant was issued for Donoghoe's arrest and an arrangement was made with the County Attorney's office, whereby Donoghoe paid the $3,000.00 bad check and the case was continued by the County Attorney's office until payment in full was made to the client.

Sometime during the course of his representation of Donoghoe Respondent learned that Donoghoe was being threatened with further criminal prosecution and disciplinary action before the Bar Association if the full amount of the unpaid balance was not immediately paid. The Respondent testifies that he informed Donoghoe that he must make restitution to these clients before the charges would be dismissed. The Respondent on one occasion engaged in a heated telephone conversation with one of the Pennsylvania clients in which the Respondent was informed that prosecution would ensue unless the money was paid.

The Respondent testifies that he felt Donoghoe was being taken advantage of, therefore, he made arrangements to loan Donoghoe the money and the criminal prosecution subsequently abated.

The Respondent admits he did not have the money to loan, however, he undertook to raise the money and this is where the problems began to arise in this case.

[2]One volume consisting of the original record, eight volumes of depositions, and three volumes of evidence.

[3]The trial court absolved Heavrin of liability except for $11,000.00 he received when the $105,000.00 check was presented to Citizens for deposit. This was before Maureen Collie, who authorized the transaction, knew anything concerning the questionable endorsements.

The Respondent had previously represented one Norman Bodenbender and borrowed money from him personally on other occasions.

It appears that Mr. Bodenbender was a person of some means but secreted the full extent of his assets. The Respondent called Bodenbender and asked for the loan and Bodenbender questioned the purpose of the loan. At this point the Respondent felt his duty to his client (Donoghoe) prevented him from disclosing the purpose was really to bail out a recalcitrant lawyer so he told Bodenbender it was for a real estate deal.[4] The conversation culminated in a loan to the Respondent by Bodenbender in the amount of $32,500.00 some two days later.

During the conversation and prior to his getting the money from Bodenbender, the Respondent admits that he was becoming suspicious of Donoghoe's actions[5] but in spite of his suspicions, he still felt he could help him out of these difficulties and they discussed the matter of security for the loan from Respondent to Donoghoe.

Respondent states he was impressed with Donoghoe's apparent affluence (airplanes, boats, cars, diamonds) and it was arranged that Donoghoe would sell to the Respondent some jewelry worth from $100,000.00 to $200,000.00 for $44,000.00, with an option in Donoghoe to repurchase the jewelry within thirty days at the principal amount plus 9% interest. A document to this effect was drawn up between Donoghoe and the Respondent.

With the $32,000.00 ($32,500.00) loan from Bodenbender, the Respondent paid $10,000.00 to Fidelity Finance Corporation to pay off a loan to Donoghoe and

[4]In lawyer's language this is a misrepresentation. In Layman's language this is a lie.

[5]This was prior to June 15, 1972.

get a release of the jewelry they were holding as collateral. The remainder of the loan was used to keep Mr. Donoghoe's Pennsylvania clients from filing complaints with the Bar Association. To further carry out the plant, (sic) the Respondent borrowed $10,000.00 from his father.

The Respondent took possession of the jewelry in question and took it to a jewelry dealer for safekeeping, intent upon returning and claiming the jewelry at the end of thirty days in the event Donoghoe did not come up with the money.

On June 12, 1972, Donoghoe came into possession of a check in the amount of $105,000.00 in settlement of a claim. The check had a number of payees on it, including a lawyer by the name of Haddad in Miami, Florida (no relation to Frank Haddad). Donoghoe tried to cash the check at Liberty National Bank. The bank was somewhat suspicious of Donoghoe because of indications he had previously kited checks between banks in Louisville and Mr. Netherton from Liberty told Donoghoe to have the check certified.

In the meantime, Mr. Haddad of Florida called Netherton concerning a back check of Donoghoe's and Netherton mentioned the $105,000.00 check which had Haddad's name on it and Haddad said he hadn't endorsed it.

Donoghoe flew to Chicago and had the check certified and when Donoghoe presented the check again, Netherton wouldn't cash the check because of his conversation with Haddad concerning a possible forgery.

After the second refusal by Liberty to cash the check, Donoghoe consulted with the Respondent who proceeded to assist him in cashing the check. Donoghoe and the Respondent went to the Liberty National Bank and attempted to cash the check and were refused,

whereupon Heavrin became incensed, quoted some law about the UCC to the officer of the bank, and indicated he would take it to his bank at Citizens who would cash it.

Mr. Netherton of Liberty, having friends in the banking fraternity, attempted to call a friend at Citizens to warn him about the endorsement on the check, but was unable to reach him until Monday, June 19, 1972, at which time he alerted a Mr. Maple at Citizens of possible forged endorsements.

On June 15, 1972, Donoghoe gave a check for $49,000.00 to the Respondent to repay the loan the Respondent had made to Donoghoe, together with his fee. Within thirty minutes after the Respondent received the check from Donoghoe and deposited it to his account, Donoghoe called him and informed him that the check for $49,000.00 was no good because his wife had paid a series of large bills. Mr. Heavrin then wrote a check on his own account to Donoghoe in the amount of $49,000.00 which he admittedly did not have in his account.

On Friday, June 16, 1972, the Respondent presented the $105,000.00 check to Mrs. Maureen Colley (sic) at the Citizens Bank and Mrs. Colley's (sic) testimony is that Heavrin represented to her that he knew personally each person had endorsed the check.

Heavrin denies this[6] and, in fact, there is some controversy whether Heavrin endorsed the check in the presence of Mrs. Colley (sic) or had already endorsed it prior to presenting it to her.

In any event, there was some controversy prior to the cashing of the check but after consultation with bank officials, and the check bearing certification, the Citizens Fidelity cashed the check; whereupon, the

[6]The majority of the court believes Ms. Collie.

Respondent put $45,000.00 in his attorney account, $49,000 in his personal account and took $11,000.00 in cash which he turned over to Donoghoe.

On June 16, 1972, the Respondent wrote a check payable to cash for $35,000.00 on his Attorney at Law Account and later deposited the same in his Escrow Account at the Bank of Louisville. On the same day he drew a check to Donoghoe in the amount of $48,958.00 on his personal account, and further on June 19, 1972, he certified a $10,000.00 check on his Attorney at Law Account making it payable to himself, which was then placed in his Escrow Account with the Bank of Louisville.

On June 17, 1972, he deposited the $35,000.00 in his Escrow Account and made disbursements in the following sums:

$57.00 to Dennis O'Connor
$5,489.50 to Thomas B. Robertson, Sr.
$569.50 to James F. Donoghoe
$24,884.00 to Norman Bodenbender
$2500.00 to Don M. Heavrin
$1500.00 to Don M. Heavrin

A further recitation of facts is unnecessary, however, we deem it appropriate to note that eventually it was found the endorsement on the checks were either wholly or partially forged, and litigation arose between the Citizens Fidelity Bank and all parties, including the Respondent, Heavrin, to establish liability for the forged endorsements. The Judgment of the Jefferson Circuit Court found the Respondent, Heavrin, liable for $11,000.00 which the Bank turned over to him in cash personally and which he later gave to Donoghoe.

QUESTIONS PRESENTED

1. Does the Conduct of Heavrin With Respect to His Dealings With Donoghoe Constitute Unethical and Unprofessional Conduct Calculated to Bring the Bench and Bar of Kentucky Into Disrepute?

2. Is the Bar Association Barred From Bringing These Disciplinary Proceedings on the Grounds That the Decision of the Jefferson Circuit Court in the Civil Action is Res Judicata?

FINDINGS

On June 23, 1977, the Trial Committee duly appointed herein, filed a Trial Committee opinion, one member of the committee filing a dissenting Opinion, recommending that the Board of Governors dismiss the charges because Respondent alleged the Bar Association had not proceeded properly under the provisions of former RAP 3.160. On July 16, 1977, the Board of Governors entered the following order:

> 'Motion adopted by the Board of Governors referring the disciplinary matter concerning Donald M. Heavrin back to the Trial Committee with the direction that the Trial Committee file on or before September 9, 1977, a report in compliance with RAP 3.360. The report may still include a recommendation to dismiss for procedural defects.'

The Board feels the Respondent's conduct with respect to cashing the $105,000.00 check was in direct contravention of DR 1-102(A)(4). Further, the Board finds a violation of DR 9-102(A) relative to the separation of funds. No amount of check manipulating by the Respondent as went on in this case can be justified under the circumstances which are evident when the entire facts are documented. It is tragic the manipulations of the Respondent caused the financial losses documented in this sorbid affair.

The Board further finds the conduct of the Respondent constituted a reckless disregard for the rights of the payees on the checks in question and is a violation not only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102.

The Board cannot accept the Respondent's explanation of his conduct, especially in view of the uncontroverted testimony that prior to his entering into this sordid check cashing affair, he was suspicious of Donoghoe's conduct. No attorney owes the duty to a client to enter into a course of action destined to lead to the bilking of innocent parties of their money. Once having entered into this course of conduct the Respondent then devoted most of his energy to the protection of his own financial interests and not to the protection of the parties rightfully entitled to the funds.

The Respondent's contention that disciplinary action in this case is barred under the doctrine of Res Judicata is not valid. Res Judicata prevents a retrial of a matter which has been decided on the merits, *9 ALR 3rd 210, Sec. 2(B)*. This matter has further been decided by the Court of Appeals in the case of *Ratterman* v. *Stapleton*, Ky., 371 S. W. 2d 939 (1963).

The Board differs with the Trial Committee in that a majority of the Board feels the conduct of the Respondent as set out above constituted conduct calculated to bring the bench and bar of Kentucky into disrepute[7] for the foregoing reasons."

This court has reviewed the record and a majority of the members are of the opinion that the record adequately

[7]This is a standard which is neither vague nor ambiguous. See Nicholson v. Judicial Retirement and Removal Commission, Ky., 562 S. W. 2d 306, Part I (1978).

supports the conclusions of the Board of Governors of the Kentucky Bar Association[8] that Heavrin is guilty of unprofessional conduct of sufficiently serious nature to warrant that he be suspended from the practice of law in this Commonwealth for a period of two years. The Board of Governors found that Heavrin had violated Canon 1 of the Code of Professional Responsibility which provides that a lawyer should assist in maintaining the integrity and competence of the legal profession. It found also that Heavrin violated Disciplinary Rule 1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The Board found also that Heavrin violated Canon 9 of the Code of Professional Responsibility which provides that a lawyer should avoid even the appearance of professional impropriety. It is the view of the majority of the members of this court that Heavrin was more interested in protecting his interests than that of his client and that he knew at all times what he was doing. It is also the view of the majority of the members of this court that Heavrin was not a "lamb led to the slaughter" by the artful cunning of a skilled con man, James F. Donoghoe, a former member of the Kentucky Bar Association who has previously been permanently disbarred.

It is therefore ordered that Donald M. Heavrin is hereby suspended from the practice of law in the courts of this Commonwealth for a period of two years and it is ordered that he pay the costs of these proceedings.

All concur except Palmore, C.J., and Clayton, J., who dissent.

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[8]This is a civil not a criminal proceeding. Proof by a preponderance of the evidence is all that is required. Louisville Bar Ass'n. v. Hubbard, 282 Ky. 734, 139 S. W. 2d 773 (1940); Commonwealth v. Ritchie, 114 Ky. 366, 70 S. W. 1054 (1902); see also Kentucky Bar Ass'n. v. Franklin, Ky., 534 S. W. 2d 459 (1976).

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SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

DISSENTING OPINION BY CHIEF JUSTICE PALMORE

The Trial Committee which heard the evidence in this case found Heavrin guilty of nothing more than bad judgment, and recommended unanimously that all charges against him be dismissed. Ten members of the KBA Board of Governors nevertheless found him guilty on the last four of seven counts.

Count 1 of the formal charges related to the alleged loan of money by Heavrin to Donoghoe, secured by a pledge of jewelry. Count 2 cited the circumstances of the loan to Heavrin by Bodenbender. Count 3 charged Hearvin with covering up ethical misconduct on the part of Donoghoe by borrowing money to pay the claims of his disgruntled clients. These are the three counts on which both the Trial Committee and the Board of Governors found Heavrin not guilty of any unethical conduct. The other four counts all relate to the handling of the $105,000 check and its proceeds and the exchange of worthless $49,000 checks between Heavrin and Donoghoe. This is the area in which the Board of Governors adjudged misconduct, and in which I do not concur in its judgment. After reading Heavrin's testimony from the perspective of how things appeared to him at the time each of the successive events took place, I am not convinced that his conduct justifies a mark of Cain that he will have to bear for the rest of his life.

Despite the large record in the bank case (which loses much of its importance with this court's unanimous rejection of the theory that the circuit court judgment forecloses the question of ethical misconduct), there really is not much in the way of conflicting evidence. The facts are virtually undisputed. The one question on which Heavrin and a witness differed is whether he told Miss Collie, at the Citizens Bank, that he had personal knowledge that the endorsements on the $105,000 check were genuine. She said he did. He denied it. The Board of Governors made no finding on that precise issue. The finding of the Committee was "There was no evidence of any unethical conduct in the cashing of the check.[1]

This is a very critical point to me because if I were convinced that Heavrin did lie to Miss Collie I probably would concur in the majority opinion. I think, however, that a lawyer standing in jeopardy of losing his livelihood and sustaining a permanent blemish on his reputation is entitled to the benefit of any reasonable doubt. Both Miss Collie and Heavrin gave their initial recollections of the conversation more than a year after it had taken place, and by that time each of them had an axe to grind. It was to her interest that she not appear to have been careless, because her employer, the bank, stood to lost $105,000 if found guilty of negligence.[2] And presumably it was in Heavrin's interest to resist any suggestion of intentional wrongdoing. There is no doubt that Heavrin himself believed the endorsements were good. Not only did he guar-

[1]It may fairly be inferred, moreover, from Miss Collie's testimony that in clearing the check she was chiefly influenced by the fact that it had been certified.

[2]Eventually the circuit court did find the bank negligent and held it liable for $94,000 of the loss, that being the amount still undrawn from Heaxrin's accounts when the bank discovered facts sufficient to put it on notice that one or more of the endorsements had been forged. Miss Collie, of course, was not in any way responsible for the bank's failure to act at that time.

antee them by adding his own enforsement, but he offered to and did to the best of his knowledge tell the bank, before it honored any checks drawn against the $94,000 deposited by him, where these endorsers could be reached in order that their signatures could be verified. I cannot convict him on the strength of the Collie exchange. Not many people can recall the precise details of past conversations with such Proustian accuracy as the majority of this court seems to ascribe to Miss Collie's version.

Donoghoe had been referred to Heavrin by Frank Haddad, then an official and later president of the Kentucky Bar Association. At this point in time, of course, the real Donoghoe had not been revealed to the world as it knows him now, serving a sentence in the penitentiary for bilking his clients. He was to all appearances a highly successful damage-suit lawyer. Like most big spenders, he was short on cash and behind in settling his accounts, but ostensibly had plenty of assets. Certainly Heavrin, so far as this record shows, had no reason to and in fact did not doubt his solvency or suspect that he was living in a house of cards that was about to collapse. Heavrin was simply an impressionable young lawyer with less than five years of practice, representing a proven moneymaker with lots of jewelry, big automobiles, and a showy home,[3] who had suddenly fallen into financial staits that must have seemed no more than temporary and accidental. As Heavrin saw it, and justly so, his job as a lawyer was to fight a rear-guard action until Donoghoe could regain his footing.

[3]Heavrin's description of Donoghoe: "At that time I was gullible and more or less totally impressed with the guy. The guy had a fantastic house, the best cars money can buy, the biggest cases of anybody I have seen in my life, made more money than I imagined to be on the face of the earth, telephones in his car, a cable address, pilot, adventurer, marine," etc. It is clear that Donoghoe was a con artist of masterful proportions, and was able to take Heavrin in as easily as he had gained the confidence of his own clients.

Donoghoe had collected some money from clients in Pennsylvania, and he said they were letting him borrow some or all of it for 9% interest. He was in arrears in settling with them, and when Heavrin came into the picture they had caused criminal charges to be brought against him. According to Donoghoe, he owed the Pennsylvania people $42,500, but the immediate problem was a $3,000 cold check he had sent them. The check matter was straightened out in short order, but between the Pennsylvania people and other creditors Donoghoe still owed about $44,000 and the Pennsylvanians were pressing for immediate satisfaction of their demands. Meanwhile, Donoghoe assured Heavrin that he was expecting in the near future a fee of $100,000 or more out of a hotel transaction in Owensboro and substantial fees from several other pending cases, including the one in Florida. In order to get the Pennsylvania clients off Donoghoe's back Heavrin undertook to borrow the necessary money himself, believing of course that Donoghoe would be able to repay it within a short time. First he applied to Bodenbender, who had only $32,500 available to lend, and later he got $10,000 from his stepfather in Atlanta.

Out of the $32,500 borrowed from Bodenbender, $10,000 was used to redeem out of hock some jewelry owned by Donoghoe, including a 10-carat diamond ring insured with Lloyds of London for $55,000. Heavrin's impression was that the jewelry had a value of between $100,000 and $200,000. To secure himself, he drew up and had executed an agreement by which Donoghoe sold him the jewelry for $44,000 subject to a right to repurchase it in 30 days for the same price plus 9% interest. Heavrin applied the remainder of the Bodenbender loan toward Donoghoe's debts, including partial payment of the Pennsylvania claims. Then the Pennsylvania people became importunate for the balance of their money, and this is when Heavrin resorted to his stepfather for the $10,000 loan. Except for an item

of $5489 still owing to one Thomas Robertson, the last of the money owed to the Pennsylvania clients was paid out of the $10,000. Donoghoe now owed Heavrin $42,500.

Shortly afterward, as Donoghoe had assured Heavrin would happen, one of the Donoghoe China clippers came sailing home full-laden. On June 6, 1972, a Chicago firm issued a $105,000 check in partial satisfaction of a judgment and settlement he had obtained in Florida incident to a wrongful death action. It was made out to Calvin Young, surviving father of Ray Edward Young, deceased; Donoghoe as administrator of the Ray Edward Young estate; Edgar Addington, surviving father of Carl Addington, deceased; Estill Barr as Administrator of the Carl Addington estate; and Donoghoe and a Florida law firm, their attorneys. Young resided in Raceland, Greenup County, Kentucky, and Addington and Blair lived in Whitesburg, Letcher County, Kentucky, though Heavrin thought they all lived in Whitesburg. In any event, at some time before the check was finally negotiated Donoghoe rented an airplane for the purpose, as Heavrin understood it, of going to Whitesburg to have it endorsed.

On Tuesday, June 13, Heavrin saw Donoghoe off on a plane trip to Miami to see the Florida lawyers, and on that day Donoghoe did in fact give Gilbert Haddad, a member of the Florida firm, a $22,000 check in payment of its share of the attorney-fees. On Thursday, June 15 Donoghoe presented the $105,000 check at the Liberty National Bank, in Louisville, where he had an account. It bore the endorsements of all the payees, though as we now know the endorsements other than Donoghoe's own had been forged by him. The bank declined to negotiate the check unless it was certified. Donoghoe then took a plane to Chicago, had the check certified, and on the next day, Friday, June 16, returned with it to the Liberty Bank. Meanwhile, however, by a rare coincidence Mr. Haddad, the Florida lawyer, had

telephoned the Liberty Bank to ask whether the check he had received from Donoghoe was good, had learned during this conversation with Mr. Netherton, an officer of the bank, that Donoghoe was seeking to negotiate the $105,000 check, and had advised the bank that he, Haddad, had never endorsed that check.

In view of this information from Haddad, Mr. Netherton again declined to negotiate the check, but concedes that he did not tell Donoghoe the reason why he would not do so. Heavrin, who accompanied Donoghoe to the bank on Friday, could not understand why the bank would not honor a certified check,[4] and suggested to Donoghoe that they take it over to the Citizens Bank, where Heavrin was a regular customer. Through Miss Collie, as we know, Citizens honored the check, paying Hearvin $11,000 in cash and crediting $49,000 to his personal account and $45,000 to his business account.

Meanwhile, on Thursday the 15th the exchange of worthless $49,000 checks had taken place. On that day Donoghoe gave Heavrin a $49,000 check drawn on the Liberty Bank to cover the $42,500 Heavrin had borrowed and paid out for him plus a fee for Heavrin's services. Heavrin deposited it in his bank account at Citizens, but very shortly thereafter Donoghoe came to Heavrin's office and wanted the check back because his wife had written some other checks, that would deplete his bank account.[5] When Heavrin told him he had already deposited the check, Donoghoe asked Heavrin to write him a check in the same amount so that he, Donoghoe, could deposit it. Heavrin complied.

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[4]According to Heavrin, the reason given by Netherton was that it was "drawn on uncollected funds."

[5]Though Donoghoe did not testify in the bank case or in this proceeding, when he gave Heavrin the $49,000 check he was about to deposit the $105,000, and it might reasonably be surmised that the Liberty Bank's unexpected refusal to credit the $105,000 check to his account was the real reason he came to Heavrin's office to retrieve the $49,000 check.

On the next day the checks were returned by the respective banks, to no one's loss. Unorthodox as this transaction may have been, there was no intent, on Heavrin's part at least, to injure or defraud anyone, and no injury or fraud resulted from it.

Returning now to Friday, June 16, 1972, the day on which the $105,000 check was negotiated at the Citizens Bank, it is necessary to introduce other background details to facilitate understanding Heavrin's handling of the money. As we have said, he understood that Donoghoe had been to Whitesburg to see the clients there, and he knew he had gone down to Miami to see the Florida lawyers. It was not unreasonable for him to assume that the necessary endorsments on the check had been procured in the course of these visits. Donoghoe had told him that he had a 50% contingent-fee arrangement with the clients.[6] Heavrin also had the impression from Donoghoe that the $105,000 was part of a settlement that amounted to $175,000 or $180,000, though actually the total was $130,000 (an $80,000 judgment on the Young claim and a $50,000 settlement of the Addington claim).[7]

Heavrin kept an escrow account in the Bank of Louisville, several blocks distant from the main office of the Citizens Bank where the $105,000 transaction took place. In the Citizens Bank he maintained two accounts, a business account for his office transactions (which he called his "legal account") and a peronal account for his private or household affairs. When the bank honored the $105,000 check, Heavrin gave Donoghoe $11,000 in cash and deposited $49,000 in the personal account and $45,000 in the

[6]In fact, it was a 40% contract.

[7]Unbeknownst to Heavrin, Donoghoe had previously received and forged the endorsement of Calvin Young on a $20,000 check made out to him and Young. The remaining $5,000 had already been paid in the form of still another check, which is not involved here.

office account. At this point it is important to understand that these two deposits in Heavrin's bank accounts at Citizens were made for the sake of temporary convenience, and not through any intent to commingle clients' funds with personal funds. The transaction took place toward the end of banking hours on Friday, June 16, 1972. The Bank of Louisville, where Heavrin kept his escrow account, was several blocks away. Donoghoe was in a hurry, because, as Heavrin understood it, "he was going to drive down or fly down to Whitesburg and pacify the clients and Estill Blair . . . who knew all the families and who was the executor of one of the estates. Mr. Blair had been in Louisville either a day or two days before that to get money out of the settlement for the purpose of paying immediate bills that were pressing down on these people, and Donoghoe's comment was that out of a case where he had earned 80 some-odd thousand dollars . . . he had gotten to keep $1,000. He was going to keep $1,000 and take $10,000 to those people."

According to Heavrin, Blair had come to town very shortly after Donoghoe received the $105,000 check, "and it had taken such a long time to get the money after the settlement of this case that the people down there were committed on some financial obligations that had to be met, and they were not particularly anxious to have to wait for a check to be deposited and clear the bank, and so Blair came up to Louisville to get cash to satisfy their immediate financial needs. That was one of the things he [Donoghoe] objected to when I asked him to have the check certified. He objected because Blair was in Louisville and he wanted the money. So he apparently worked out some arrangement where Blair went back to Whitesburg and the agreement seemed to be that he would then personally deliver the money down there to those people."

So much for the $11,000 in cash. The two bank accounts at Citizens were utilized merely as conduits for the remain-

ing $94,000. The $45,000 deposited in the office account was promptly checked out and deposited in his escrow account at the Bank of Louisville for use in paying off Donoghoe's accounts, including what he owed Heavrin.[8] In other words, Heavrin received $45,000 for the purpose of satisfying the outstanding claims against Donoghoe, which he proceeded to do, through checks drawn on his escrow account. The other $49,000 was for Donoghoe to distribute to his clients, and was deposited in Heavrin's personal account so that Heavrin could give Donoghoe a check instead of $49,000 in cash. Accordingly, Heavrin drew a check to Donoghoe for $48,958 that same afternoon.[9]

To summarize the transaction at Citizens Bank on June 16, out of the $105,000 check Donoghoe got (in round figures) $60,000, $11,000 of which was cash and $48,958 was in the form of a check from Heavrin, and the remaining $45,000 was processed through Heavrin's personal account at Citizens Bank into his escrow account at the Bank of Louisville. Heavrin proceeded to disburse the $45,000 as agreed, and Donoghoe, presumably, made off with the $60,000. Heavrin's explanation for having placed the money in two different bank accounts at Citizens was to the effect that he wanted to keep the money he was going to disburse, and for which he regarded himself as accountable, separate from the money going directly to Donoghoe.

There are a few knots and kinks in the factual picture of this case that this writer has not been able to unravel. For example, there is the $42 difference between the $49,000 deposited in Heavrin's personal account and the $48,958 he checked out of it to Donoghoe. That it was later reimbused to Donoghoe as a part of the $569.50 drawn by

[8]One payment out of this fund was a $569.50 check to Donoghoe, which Heavrin explained was to reimburse him for the amount of a miscalculation in computing the total of outstanding debts.

[9]This $42 difference between the $49,000 deposit and the $48,958 check was reimbursed to Donoghoe in the $569.50 check mentioned in footnote 8.

Heavrin on his escrow account was brought out in the testimony, but why the difference in the first place is one of those little mysteries to which the lawyers in the case apparently knew the answer already and did not attempt to get into the record. Nevertheless, neither this particular hiatus nor any of the other unanswered puzzles inhering in the record provide any supportive basis for the charges of ethical misconduct against Heavrin.

At this point, it ought to be brought to the reader's attention that the formal charges initiated against Heavrin by the Inquiry Tribunal contained no reference whatever to the Canons or Disciplinary Rules, but alleged facts only. The rules and principles alleged to have been violated were selected at the end rather than the beginning of the process, both figuratively and literally as an afterthought. Somewhat in the style of Alice's Queen of Hearts, the Board evidently convicted Heavrin first and then decided what it had convicted him for. This may comport with due process, but it makes me think that perhaps Heavrin had been right all along in insisting that from the beginning the charges were never sufficient.

The KBA Board of Directors concluded that Heavrin's conduct with respect to the $105,000 check violated DR 1-102(A)(4), which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Except for the alleged misrepresentation to Miss Collie, concerning which I do not believe the evidence is sufficient to justify a finding of guilt, it is very clear to me that there is no basis whatever for condemning Heavrin under this rule, which is directed at intentional or wilful misconduct as distinct from negligence or bad judgment.

The next respect in which the Board found Heavrin guilty was that he violated DR 9-102(A) "relative to the separation of funds. No amount of check manipulating . . . as went on in this case can be justified under the

circumstances which are evident when the entire facts are documented." This finding shakes me to the very foundation, because it could only have resulted from a failure to study this record thoroughly and then to think about it long enough. Even one complete reading of the evidence would not bring to a lawyer of average mentality (at least this one) a sufficient grasp of the details to mount a fair perspective. Heavrin himself, for example, testified at length on three different occasions, and one must go back and forth among these three transcripts in order to fill in the gaps and fit the pieces together. The process of gathering, collating, arranging and compressing the pertinent evidence into the simple narrative set forth in this dissenting opinion certainly has consumed more of the writer's time than might appear at first blush.

DR 9-102(A) condemns the mingling of a lawyer's funds with those of his client. No one has cited any authority for the proposition that it cannot be done with the knowledge and consent of the client. The client in this instance was Donoghoe. Everything that was done was with his knowledge and for his convenience and, to the extent that any "commingling" occurred, it was done in his very presence and under his supervision. But even if that were not a sufficient answer to the charge of commingling, there was no real commingling here anyway. $49,000 was put into one of Heavrin's accounts so that he could give Donoghoe a check instead of cash. The other $45,000 was put in his office account so that he would write a check to his escrow account in another bank and then distribute the money as directed by his client, which he did. Except for the insignificant $42 mentioned earlier in this opinion, the deposit and transfer of these funds were completed almost contemporaneously. None of the money remained in either of Heavrin's private accounts long enough to get warm, much less to find a new home. I cannot believe the members of the Board thought this through.

The last references by the Board to specific rule violations are that Heavrin's conduct "constituted a reckless disregard for the rights of the payees on the checks [sic] in question and is a violation not only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102."

Both Canon 9 and DR 1-102 cover a good deal of territory. Canon 9 says, "A lawer Should Avoid Even the Appearance of Professional Impropriety." The Ethical Considerations and Disciplinary Rules following Canon 9 all provide specific applications of that broad precept. Except for the matter of commingling funds, which I have already discussed, none of them comes close to this case. DR 1-102 declares it misconduct to (1) violate a Disciplinary Rule, (2) circumvent a Disciplinary Rule, (3) engage in illegal conduct involving moral turpitude, (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, (5) engage in conduct that is prejudical to the administration of justice, or (6) engage in any other conduct that adversely reflects on his fitness to practice law. Thus far, I do not see that Heavrin violated or circumvented any of the Disciplinary Rules mentioned by the Board, and I do not believe anyone involved in this proceeding would claim that he engaged in illegal conduct. If he did, apparently the grand jury of Jefferson County never got word of it. Item (4), as I have suggested before, refers to intentional deceit. Item (5) pertains to the administration of justice and obviously can have no application to this case. Only Item (6), "conduct that adversely reflects on his fitness to practice law," could possibly be argued as appropriate to the charge that Heavrin disregarded the rights of the payees of the $105,000 check.

Some years ago, in Kentucky State Bar Association v. Taylor, Ky., 482 S. W. 2d 574, 582 (1972), we made the following observation: "If the canons of ethics adopted for the legal profession were tested under the 'void for vague-

ness' doctrine which has spelled the doom or various breach of peace and disorderly conduct laws throughout the country it is doubtful that they would survive this case." I repeat that observation here. Although this is not a criminal case, and the principles of constitutional law applicable to criminal cases are not entirely applicable here, the right to engage in a professional practice, once earned, is a right of great value, and its loss by revocation or suspension is nearly as serious a punishment as a criminal conviction and sentence. Without attempting to research and write a law review article on the subject, I think the due process rights of a respondent in a disciplinary proceeding which may result in the loss or suspension of his license to practice can be no different from those of a defendant in a criminal case. In fine, the law under which he is being tried must be clear, and the charge must be specific. In this proceeding neither of those requirements has been satisfied.

"Conduct that adversely reflects on his fitness to practice law." But what standard? And more importantly, by whose standard? The answer is unavoidable—the subjective standard of whoever happens to be doing the judging. So far as I am concerned, that cannot be the law in a civilized society—not in this country, anyway.

Assuming, however, that I am wrong in holding the opinion that this undefined standard of conduct, uncoupled with some other more specific violation, cannot be a valid basis for disciplinary action, let us take one last look at the culpability, vel non, of Heavrin's conduct toward Donoghoe's clients.

The first thing that must be remembered is that he believed Donoghoe and trusted Donoghoe.[10] He thought

[10]It is interesting to note that at one point during the course of getting the $105,000 check negotiated Heavrin actually thought about calling Mr. Blair in Whitesburg to make sure it was all right, but changed his mind out of a feeling of guilt for mistrusting Donoghoe, who, as Heavrin put it, had never lied to him.

Donoghoe had 50% of the money coming to him as a fee.[11] The $60,000 turned over to Donoghoe was ample to satisfy his clients.[12] The endorsements on the check, which Heavrin assumed to be genuine, gave witness than the clients trusted Donoghoe with the proceeds of the check. Indeed, had Heavrin merely given Donoghoe the whole $105,000 in cash, this proceeding would never have arisen. As it is, he took care to see that out of the share of the money he thought was Donoghoe's, Donoghoe paid his debts. It just did not occur to him that Donoghoe, with what Heavrin thought to be enough money to settle with his clients, would not do so.

Gullible, yes. Careless, probably. Moral turpitude, no. Suspension from practice, emphatically no. I simply feel that my obligation as a judge compels me to protest this result.

Clayton, J., concurs in this dissent.

[11]At that time we had not yet decided First Nat'l Bank of Louisville v. Progressive Cas. Ins. Co., Ky., 517 S. W. 2d 226, 230 (1975), holding that an attorney has no proprietary interest in money collected for his client until he has delivered it over to the client. (That case arose out of another of Donoghoe's criminal excursions.)

[12]The $45,000 payment to Heavrin also operated to redeem Donoghoe's jewelry, which now became an unencumbered asset of considerable value.

SUPREME COURT OF KENTUCKY

78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF MANDATE

On motion of the respondent, Donald Heavrin, a stay of execution and enforcement of this Court's mandate of January 3, 1979, is granted for a period to and including April 9, 1979, in order that respondent may make application to the Supreme Court of the United States for a writ of certiorari.

Any additional request for stay deemed necessary should be addressed to the Supreme Court of the United States.

Entire Court sitting. All concur.

ENTERED January 8, 1979.

(s) John S. Palmore
Chief Justice

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Donald M. Heavrin, whose last known address is 914 Republic Building, Louisville, Kentucky 40202, a member of said association, did engage in the following professional and unethical conduct:

I

In or about the spring of 1972, Respondent began representing James F. Donoghoe, a former member of the association, in a criminal proceeding in Jefferson County Court and in Mr. Donoghoe's negotiations with some of his clients. In or about 1972, Respondent loaned his client, Mr. Donoghoe, certain funds to be used to pay Mr. Donoghoe's clients in Pennsylvania who include one Thomas C. Robertson and who were demanding certain trust funds. In order to secure himself in said loan, Respondent accepted a bill of sale from Mr. Donoghoe for certain jewelry which Mr. Donoghoe would have the right to repurchase within thirty days. Respondent thereby took a proprietary interest in the representation of his client, Mr. Donoghoe.

II

Within the same facts and circumstances as related in Count I above, Respondent obtained part of the said monies

with which to loan to Mr. Donoghoe from Norman Bodenbender, whose last known address is Trustcon, Inc., Greenville, Indiana. Respondent misrepresented the purpose of said loan as being for a real estate deal which would take a short time to repay. Respondent met Mr. Bodenbender and borrowed $32,500. Later, Respondent borrowed $10,000 from his father to be loaned to Mr. Donoghoe.

III

Within the same facts and circumstances as related in Count I above, Respondent learned that some of Mr. Donoghoe's clients were going to report Mr. Donoghoe's conduct to the bar association. In order to keep said clients from so reporting, Respondent started paying the said clients from the borrowed funds, and Respondent thereby participated in covering up alleged unethical conduct of a member of the bar.

IV

Within the same facts and circumstances as related in Count I above and in or about June, 1972, Mr. Donoghoe received a settlement check in the amount of $105,000 from a civil action in which he represented certain plaintiffs. Said check was made payable to Calvin Young, surviving father of Ray Edward Young, deceased; Mr. Donoghoe as administrator of Mr. Young's estate; Edgar Addington, surviving father of Carl Addington, deceased; Estill Blair, administrator of Mr. Addingtons estate; and to Mr. Donoghoe and a Florida law firm as attorneys. Because Mr. Donoghoe was experiencing difficulty in negotiating said check, Respondent went with Mr. Donoghoe to Citizens Fidelity Bank and Trust Company, Louisville, Kentucky, where Respondent had an office and personal account. There, Respondent endorsed said check and falsely informed bank officer Maureen Collie that he personally knew that all endorsements were properly made. The check was

then cashed. A true and accurate copy of said check is attached hereto, made a part hereof and marked as "Exhibit A." The endorsments on said check, with the exception of Respondent's and Mr. Donoghoe's were forged.

V

Within the same facts and circumstances as related in Count IV above, Respondent received from Citizens Fidelity Bank and Trust Company $11,000 in cash whereupon he handed the same to Mr. Donoghoe. Respondent deposited $49,000 of the said settlement funds into his own personal account at Citizens Fidelity Bank, being Account No. 205-926-6. Respondent also deposited $45,000 to his own attorney-at-law account being Account No. 003-764-8. Respondent further commingled said funds with his own by depositing, on or about June 17, 1972, $35,000 from his said attorney at law account to his own escrow account at the Bank of Louisville, Louisville, Kentucky. From Respondent's escrow account at the Bank of Louisville, Respondent subsequently issued drafts to various persons including himself none of whom, other than Mr. Donoghoe, were payees of the said settlement check.

VI

Within the same facts and circumstances as related in Count V above, Respondent knew the proceeds from said check were intended for certain payees. He was the last endorser. After cashing said check, Respondent did nothing to protect the payees and participated in the misappropriation of said funds.

VII

In or about June, 1972, Mr. Donoghoe gave to Respondent a check for $36,000 to be used to partially repay loans that Respondent had given to Donoghoe. After depositing said check, Mr. Donoghoe informed Respondent that there were insufficient funds to cover his check. Respondent,

thereupon, wrote his own check to Mr. Donoghoe for $36,000 with actual knowledge that he did not have sufficient funds to cover his check. Both checks were returned because of insufficient funds.

WHEREUPON, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RAP 3.380.

Kentucky Bar Association
By: (s) William P. Donan, Chairman
Inquiry Tribuntal

Attest:
(s) Leslie G. Whitmer, Director
Kentucky Bar Association

RULE 3.160(a), SUPREME COURT OF KENTUCKY

"INITIATION OF DISCIPLINARY CASES"

"Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge the receipt of the complaint or respond to the merits."

Rule 3.170
Rule 3.230
Rule 3.360
Rule 3.370
Rule 3.410

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

TRIAL COMMITTEE OPINION

At its first hearing on March 11, 1977, the Trial Committee was requested by Dolnad M. Heavrin, through his counsel, to dismiss all charges because of an alleged procedural defect violating Mr. Heavrin's federal and state constitutional rights. The Trial Committee, with one dissent, feels that the respondent's arguments of violation of due process and equal protection have merit and accordingly recommend to the Board of Governors that all charges be dismissed.

The heart of Mr. Heavrin's claim is that the Kentucky Bar Association utterly failed to comply with Rule 3.160 in the initiation of this disciplinary case. That rule, which is the only rule that provides for initiation of disciplinary cases, provides:

> "Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by a certified mail of the complaint and inform him that he has 15 days to acknowledge receipt of the complaint or respond to the merits."

The facts of the initiation of this disciplinary proceeding are really not in dispute. The Bar Association received a letter from the Commonwealth Attorney of Jefferson

County to the effect that the Bar Association should look into Mr. Heavrin's conduct which had come to light in a civil proceeding in Jefferson Circuit Court, Case No. 174698, styled "Citizens Fidelity Bank and Trust Company vs. Donald M. Heavrin, et al.". For whatever reason, the Bar Association decided to keep this letter from the Jefferson Commonwealth Attorney undisclosed to respondent. On August 15, 1973, the Kentucky Bar Association wrote a letter to Donald Heavrin in which the Director of the Association stated, "Please accept this letter as a notice of complaint filed against you pursuant to the provisions of RCA 3.160." Mr. Heavrin was not told that the complaint had been initiated by the letter from the Jefferson Commonwealth Attorney and he was not given a copy of this letter.

Mr. Heavrin responded by counsel to the letter of August 15, 1973, by a letter from his counsel dated August 16, 1973, requesting that the matter be abated during the pendency of the Jefferson Circuit Court action.

The Bar Association having agreed to abate the proceedings, and those proceedings having finally run their course, on June 10, 1976, the Bar Association again wrote to Donald M. Heavrin, stating:

> "An investigation by authority of this office has caused the following allegations to be made by this office, and you should regard them as a formal complaint issued against you."

Mr. Heavrin responded by counsel and the matter proceeded to the Inquiry Tribunal, where formal charges were prepared, and then to the Trial Committee.

There can be no doubt that the technical language of Rule 3.160 was violated by the Bar Association. The complaint against the respondent for unprofessional conduct came from the Jefferson Commonwealth Attorney, in the

form of a letter, and Mr. Heavrin was not notified of the complaint and was not given a copy of the complaint.

The trial committee feels that Rule 3.160 was written for a purpose, and that purpose was to give the attorney against whom some complaint has been made an opportunity not only to know that he is under an investigation but an opportunity to know the person who is making the complaint and the nature thereof. Mr. Heavrin wasn't given this opportunity.

To rule in this case that the Bar Association complied with Rule 3.160 would be to invite a practice wherein secretive complainants and undisclosed informants clandestinely report to the Bar Association the activities of lawyers, giving the Bar Association an opportunity to fully conduct an investigation without informing the attorney involved.

It may very well be that the Bar Association feels that it must proceed in this matter in order to achieve adequate discipline over lawyers. However, it does so in violation of Rule 3.160.

(s) Lloyd E. Rogers, Chairman
(s) Joe C. Savage

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

REPORT OF TRIAL COMMITTEE

FINDINGS OF FACT

The trial committee deems the following facts proven by the preponderance of the evidence.

Charge I

The respondent loaned money to a client. Heavrin Deposition pp. 50-51.

Charge II

The respondent borrowed money from Mr. Bodenbender without disclosing the true purpose of the loan. There was no reliance by Bodenbender upon any representation of the respondent.

Charge III

Any information or knowledge of Donoghoe's unethical conduct was gained through the client-attorney relationship and was therefore privileged.

Charges IV, V, VI

The doctrine of res judicata is not applicable in the instant case. The respondent was without prior knowledge of any forgeries. There was no unlawful co-mingling of funds. There was no evidence of any unethical conduct in the cashing of the check.

Charge VII

The checks exchanged by the respondent and Mr. Donoghoe were returned for insufficient funds.

CONCLUSIONS OF LAW

Charge I

While the respondent did loan money to a client, this in and of itself is not unethical conduct. EC 5-8. It is only where the attorney acquires a proprietary interest in the cause of action or subject matter of litigation that loans become unethical. DR 5-103(A). Even then there are exceptions. DS 5-103(A)(1)(2). Here, the respondent, through the guise of a purchase-sell back arrangement, loaned money to a client, a client whom he was representing in a criminal matter. The preponderance of the evidence does not support a finding or conclusion that the respondent in making the loan acquired a proprietary interest in a cause of action or the subject matter of any litigation.

Charge II

The loan to the respondent is not violative of the Disciplinary Rules. While the respondent did not disclose the true reason for obtaining the loan, there was no reliance by the lender on any misstatements of the respondent. The lender's deposition indicates that it made no difference as to the purpose of the loan, only the interest and time. See Bodenbender Deposition. There was no illegal conduct by the respondent in obtaining this loan.

Charge III

While respondent, as a member of the bar, is required to disclose to knowledge of unethical conduct, his knowledge of Mr. Donoghoe's conduct was privileged by virtue of the attorney-client relationship. Since the knowledge was privileged, his efforts in seeing that clients were paid is not a violation of the Disciplinary Rules.

Charges IV, V, VI

While the committee does not accept respondent's position that the doctrine of res judicata applies to these

charges, it does conclude that there was no violation of the Disciplinary Rules.

Charges VII

The evidence does not support a violation of any Disciplinary Rules.

RECOMMENDATION

It is readily apparent that while the respondent may have been guilty of bad judgment in a number of dealings with Mr. Donoghoe, so were many others. Bad judgment, though it sometimes leads to unethical conduct, is not grounds for disciplinary action. In view of the foregoing, it is the recommendation of the committee that all charges against the respondent be dismissed.

(s) Joe C. Savage
(s) Lloyd E. Rogers
(s) Victor Fox

Opinion Rendered October 31, 1978

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

v.

DONALD M. HEAVRIN

File No. 78-SC-278-KB

Appeal from Supreme Court

MANDATE

It is therefore ordered that the Respondent, Donald M. Heavrin, be and he is hereby suspended from the practice of law in this Commonwealth for a period of two (2) years.

It is therefore considered that the Respondent is further ordered to comply with RAP 3.390. A copy of which is attached and considered included as a part of this mandate.

It is further ordered that Respondent be required to pay the costs in this proceedings.

January 3, 1979 Respondent's Petition for Rehearing Denied.

A Copy—Attest:

(s) Martha Layne Collins
Clerk

Issued January 3, 1979

Rule 3.390 Notice to Client of Suspension or Disbarment

There shall be contained in every final order of suspension of more than two (2) months or disbarment a direction that such suspended or disbarred attorney notify all clients for whom he is actively involved in litigation and

similar legal matters of his inability to continue to represent them, and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly placed in the United States mail within ten (10) days of the date the order of suspension or disbarment is placed of record, and such former attorney shall retain carbon copies of all such letters for inspection by duly authorized agents of the Court or the Association.

Failure to do so shall subject the responden to a charge of contempt of Court.

[This amendment replaces existing Rule 3.390.]

OPINION OF JEFFERSON CIRCUIT COURT, JUDGE JAMES HUBBS, IN *CITIZENS FIDELITY BANK & TRUST CO.* v. *DONALD M. HEAVRIN, ET AL.*, #174698, JEFFERSON CIRCUIT COURT, CHANCERY BRANCH, SECOND DIVISION

"As to the claim by Citizens Fidelity Bank and Trust Company against the Defendant Donald M. Heavrin, said Defendant is the last endorser.

Heavrin had nothing to do with the forgery and there was no conspiracy; he was acting as the attorney for Donoghoe. Heavrin had received and disbursed ELEVEN THOUSAND DOLLARS ($11,000.00) on June 16, 1972, when the check in question was initially deposited. He knew nothing about any of the questionable endorsements until his conversation with Dan Ulmer on Monday morning, June 19, 1972. In the conversation, the telephone number of the Haddad law firm in Florida was discussed *as well as the address of one or two of the other parties listed on the check as 'endorsees'.**

In the Findings of Fact and Conclusions of Law filed herewith relative to the claim of Calvin Young, the Court has already stated that Citizens Fidelity Bank and Trust Company violated good banking standards in not holding

the balance of the funds in the bank until the authenticity of all endorsements had been safely established. After Heavrin ascertained the possibility of the questionable endorsements, he was under the same duty as the bank to take all necessary precautions to protect all parties involved including the bank. Had Heavrin known about the aminous telephone conversation between Dan Ulmer, Executive Vice President of Citizens Fidelity Bank and Trust Company, and the Florida law firm, he still would have been under the same duty as the bank. However, the Court finds that a short time thereafter, (possibly an hour or so) Heavrin called Mr. Ulmer's office and was informed by his secretary that everything had been cleared up and the ONE HUNDRED FIVE THOUSAND DOLLAR ($105,000.00) check would be honored. This testimony is critical in the Court's mind because (1) it was not denied and (2) the balance of the proceeds was 'turned loose.' There was no further need for Heavrin to be concerned as to the genuineness of any of the endorsements on the certified check. He was never told about Mr. Ulmer's conversation with the Haddad firm in Florida and the proof clearly shows that Heavrin knew nothing further about the transaction for some nine months thereafter.

Citizens Fidelity Bank and Trust Company cannot hold Heavrin liable for the balance of the proceeds because of its own assurances to Heavrin that all questions had been cleared up concerning the endorsements. *J. M. Robinson Company* v. *The Bank of Pineville,* 142 SW 1065. The Court finds that Heavrin endorsed the check in blank as a last endorser and he is liable to the bank for the ELEVEN THOUSAND DOLLARS ($11,000.00) given when the check was first presented for deposit. This was before Maurine Collie, who authorized the transaction, knew anything concerning the questionable endorsements.

Counsel for the Defendant will prepare a judgment in accordance with these Findings." (Emphasis ours).

PAGE 6, FINDINGS OF THE BOARD OF GOVERNORS, KENTUCKY BAR ASSOCIATION

On June 23, 1977, the Trial Committee duly appointed herein, filed a Trial Committee opinion, one member of the committee filing a dissenting opinion, recommending that the Board of Governors dismiss the charges because Respondent alleged the Bar Association had not proceeded properly under the provisions of former RAP 3.160. On July 16, 1977, the Board of Governors entered the following order:

> "Motion adopted by the Board of Governors referring the disciplinary matter concerning Donald M. Heavrin back to the Trial Committee with the direction that the Trial Committee file on or before September 9, 1977, a report in compliance with RAP 3.360. The report may still include a recommendation to dismiss for procedural defects."

The Board feels the Respondent's conduct with respect to cashing the $105,000.00 check was in direct contravention of DR 1-102(A)(4). Further, the Board finds a violation of DR 9-102(A) relative to the separation of funds. No amount of check manipulating by the Respondent as went on in this case can be justified under the circumstances which are evident when the entire facts are documented. It is tragic the manipulations of the Respondent caused the financial losses documented in this sordid affair.

The Board further finds the conduct of the Respondent constituted a reckless disregard for the rights of the payees on the checks in question and is a violation not only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102.

The Board cannot accept the Respondent's explanation of his conduct, especially in view of the uncontroverted

testimony that prior to his entering into this sordid check cashing affair, he was suspicious of Donoghoe's conduct. No attorney owes the duty to a client to enter into a course of action destined to lead to the bilking of innocent parties of their money. Once having entered into this course of conduct the Respondent then devoted most of his energy to the protection of his own financial interests and not to the protection of the parties rightfully entitled to the funds.

The Respondent's contention that disciplinary action in this case is barred under the doctrine of Res Judicata is not valid. Res Judicata prevents a retrial of a matter which has been decided on the merits, *9 ALR 3rd 210, Sec. 2(B)*. This matter has further been decided by the Court of Appeals in the case of *Ratterman* v. *Stapleton*, Ky., 371 S. W. 2d 939 (1963).

The Board differs with the Trial Committee in that a majority of the Board feels the conduct of the Respondent as set out above constituted conduct calculated to bring the bench and bar of Kentucky into disrepute for the foregoing reasons.

LETTER DATED AUGUST 15, 1973, TO THE PETITIONER, DONALD M. HEAVRIN, FROM THE KENTUCKY BAR ASSOCIATION

KENTUCKY BAR ASSOCIATION
Frankfort, Kentucky 40601
August 15, 1973

CONFIDENTIAL

Donald Heavrin, Esquire
914 Republic Building
Louisville, Kentucky 40202

Dear Mr. Heavrin:

Please accept this letter as a notice of complaint filed against you pursuant to the provisions of RCA 3.160. In

accordance with this rule, you are given fifteen (15) days from the date of this letter to respond to the complaint. This matter will be treated in accordanec with RCA 3.170 et sequi.

It appears that on or about June 16, 1972, one James F. Donoghoe, Jr., of Louisville, tendered to you a settlement check drawn on the account of Lord, Bissell and Brook in the amount of $105,000 belonging to Mr. Donoghoe's clients, Calvin Young, deceased, Edgar Addington, and the Estate of Carl Addington. A copy of the check with endorsements is enclosed. It appears that you endorsed the check after Mr. Donoghoe's endorsement and proceeded to cash the check on or about June 16, 1972. It further appears that the endorsers of the payees on the check are forgeries except Donoghoe's signature. The check in question was cashed at Citizens Fidelity Bank & Trust Company of Louisville. From the $105,000, you made the following transactions:

1. Placed $49,000 in your personal account #205-926-6, and
2. Deposited $45,000 in your attorney-at-law account #003-764-8, and
3. Took the balance of $11,000 in cash into your possession.

It appears that on or about June 16, 1972, you wrote a $35,000 check payable to cash on the attorney-at-law account and deposited the same in your escrow account at the Bank of Louisville. On June 16, 1972, you drew a check to Donoghoe in the amount of $48,958 on your personal account. On June 19, 1972, you certified a $10,000 check on your attorney-at-law account made payable to yourself which was deposited in your escrow account.

On June 17, 1972, you deposited the aforesaid $35,000 in your escrow account and made the following disbursements:

$57.00 to Dennis O'Connor
$5,489.50 to Thomas C. Robertson, Sr.
$569.50 to James F. Donoghoe
$24,884 to Norman Bodenbender, American Bank, New Albany, Indiana
$2,500 to Don M. Heavrin
$1,500 to Don M. Heavrin

The clients named on the check have never received their funds.

No contacts or communications shall be undertaken with the Inquiry Tribunal, House of Delegates, Board of Governors, Court of Appeals, or any member thereof. Please observe the provisions of RCA 3.150 and 3.290 with respect to the foregoing communications or contacts.

Please file your response within the stated time to expedite the necessary procedures. If you have any questions concerning the matter, please contact us.

Sincerely

(s) Leslie G. Whitmer
Director

LGW/sp
Enclosure
CERTIFIED MAIL

PAGES 1, 2, 3, 4 AND 5, KENTUCKY BAR ASSOCIATION'S BRIEF BEFORE THE SUPREME COURT OF KENTUCKY

SUPREME COURT OF KENTUCKY

No. 78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

RESPONSE TO NOTICE FOR REVIEW

May It Please the Court:

STATEMENT OF THE CASE

On or about August 15, 1973, an attorney filed a letter in the Office of the Director of the Kentucky Bar Association raising allegations that respondent had engaged in unethical and unprofessional conduct with respect to the extraordinary circumstances surrounding the cashing and distribution of the proceeds of a certain check in the amount of $105,000.00. The letter was supported by photostatic copies of three sworn affidavits and the check in question. The Director mailed a confidential letter dated August 15, 1973, to respondent by certified mail pursuant to former RCA 3.160 formally notifying respondent that a complaint was being made against him. The Director's letter of notice did not contain copies of the actual documents that had been filed with the Director. However, the letter of notification accurately and fully informed respondent in detail of all the factual allegations of misconduct which were contained in the actual documents.

By letter dated August 16, 1973, respondent's counsel replied to the Director's letter of notice and formally requested in accordance with former RCA 3.180(b) that proceedings before the Kentucky Bar Association be held in abeyance pending the outcome of litigation in the Jefferson Circuit Court styled Citizens Fidelity Bank and Trust Company v. Donald M. Heavrin, et al., Civil Action No. 174698. On September 5, 1973, the Inquiry Tribunal granted respondent's request for a continuance.

The Jefferson Circuit Court entered a judgment in respondent's favor on September 11, 1975, and respondent's counsel promptly mailed a copy to complainant. One week later complainant was informed by respondent's counsel that motions were going to be made to alter or set aside the judgment. Finally, on March 1, 1976, counsel for respondent confirmed by letter a telephone conversation he had with the Office of the Director, wherein he stated that an agreed settlement order had been entered in the civil litigation and that complainant would probably return the present disciplinary case to the Louisville Bar Association for further consideration. On the same day, by authority of the Inquiry Tribunal, complainant requested the Louisville Bar Association's Committee on Professional Responsibility to investigate all matters pertaining to the propriety of respondent's conduct. Said committee filed its report with complainant on June 4, 1976, and a second letter of notice dated June 10, 1976, was mailed to respondent pursuant to former RAP 3.160 which contained each and every factual allegation of professional misconduct against respondent.

Respondent filed a response to the complaint on June 24, 1976, and on September 27, 1976, the Inquiry Tribunal filed a charge consisting of seven separate counts alleging that respondent had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky

into disrepute. An answer to the charge was timely filed by respondent on October 7, 1976. A trial committee was appointed and a hearing held on March 11, 1977. During the course of this hearing, respondent's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

Complainant and respondent subsequently filed briefs with the trial committee and respondent moved the committee to dismiss the charge on the ground that he had been denied due process either because a complaint had never actually been filed with the Kentucky Bar Association or in the alternative, if a complaint had actually been filed respondent was not furnished with a copy. The trial committee, by a vote of 2 to 1, recommended to the Board of Governors that the charge be dismissed for failure by complainant to comply with former RCA 3.130, thereby, violating respondent's right under the federal and state constitutions to due process and equal protection. It is significant to note that the trial committee expressly acknowledged that complainant had in fact received a complaint *prior* to sending notice to respondent by letter dated August 15, 1973.

On July 16, 1977, the Board of Governors entered an order referring the matter back to the trial committee for a decision on the merits and a second hearing was held before the committee on August 30, 1977. The trial committee filed its findings of fact on January 2, 1978, and recommended that the charge against respondent be dismissed. On March 18, 1978, the Board of Governors, by a vote of 10 to 1, found respondent guilty as charged of Counts IV through VII of the charge and recommended to this Court that respondent be suspended from the practice of law for a period of two years. The Board of Governors has filed an opinion in the record setting forth its findings of fact and recommendation.

On June 30, 1978, counsel for respondent filed a notice for review and brief on behalf of respondent pursuant to SCR 3.370(6). Complainant respectfully submits this brief in reply.

ARGUMENT

I

Complainant Emphatically Denies That Respondent's Right to Due Process of Law Has Been Abridged Either Through Lack of Proper Notice or Undue Delay in Investigating and Processing Respondent's Case.

Respondent raises two arguments concerning alleged procedural defects in the processing of the present case. First, respondent contends that complainant violated the provisions of former RCA 3.160(a) thereby denying respondent his right to due process of law on the ground that a complaint was never filed with the Kentucky Bar Association. In the alternative, respondent contends that if a complaint was actually filed with the Kentucky Bar Association, respondent was entitled to receive a copy under RCA 3.160(a) in order to formulate an adequate response. Respondent further asserts that he has been misled and "trapped" by complainant because he cooperated in furnishing information after he had received notice of the complaint.

Complainant is offended by respondent's spurious accusation that the Director and the staff of the Kentucky Bar Association somehow conspired to manufacture a complaint against respondent in order to "trap" him. This Court is well aware of the relatively massive number of complaints which are filed with the Director each year. The Director and his assistants have neither the time nor the inclination to create complaints out of thin air. Respondent's attack on the honor and integrity of the Kentucky Bar

Association cannot obscure the fact that respondent engaged in serious and impermissible breaches of ethical conduct.

Respondent bluntly infers that an actual complaint was never filed with the Kentucky Bar Association and does not exist because respondent was never furnished with a copy. It has been the unwaivering position of complainants that respondent had absolutely no right whatsoever to a copy of the actual complaint under the Rules of the Supreme Court of Kentucky or the due process clauses of the federal and state constitutions. Former RCA 3.160 which was captioned "Initiation of Disciplinary Cases" provided:

> Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly *notify the attorney* by certified mail *of the complaint* and inform him that he has fifteen days to *acknowledge receipt of the complaint or respond to the merits.* (Emphasis supplied).

FIRST AND SECOND PARAGRAPHS OF PAGE 3, RESPONSE TO PETITION FOR REHEARING BY KENTUCKY BAR ASSOCIATION

Respondent filed a response to the complaint on June 24, 1976, and on September 27, 1976, the Inquiry Tribunal filed a charge consisting of seven separate counts alleging that respondent had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. An answer to the charge was timely filed by respondent on October 7, 1976. A trial committee was appointed and a hearing held on March 11, 1977. During the course of this hearing, respondent's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

Complainant and respondent subsequently filed briefs with the trial committee and respondent moved the committee to dismiss the charge on the ground that he had been denied due process either because a complaint had never actually been filed with the Kentucky Bar Association or in the alternative, if a complaint had actually been filed respondent was not furnished with a copy. The trial committee, by a vote of 2 to 1, recommended to the Board of Governors that the charge be dismissed for failure by complainant to comply with former RCA 3.130, thereby violating respondent's right under the federal and state constitutions to due process and equal protection. It is significant to note that the trial committee expressly acknowledged that complainant had in fact received a complaint *prior* to sending notice to respondent by letter dated August 15, 1973.

PAGES 98, 99 AND 100, TRANSCRIPT OF TESTIMONY BEFORE TRIAL COMMITTEE, MARCH 10, 1977

98

Mr. Savage: Now, I keep coming back to this, gentlemen, but for the purpose of deciding factually what has happened, I understand it's Mr. Triplett's position that, under Rule 3.6, no complaint was filed against this Respondent with the Director, and that stands unrefuted by the Bar Association?

Mr. Damron: Let me say this. The letter of notice that was issued to Mr. Heavrin by Mr. Whitmer

99

is both a letter of complaint, or the complaint as well as the notice. That's our position.

Mr. Famularo: That was based upon the letter that Mr. Whitmer has received, as I understand, bringing up the whole allegation at the outset.

Mr. Rogers: Was a copy of this letter attached to that, or did the Bar act on its own without attaching anything to it?

Mr. Damron: The Bar acted on its own investigation and sent a report of its investigation to Mr. Heavrin, which is contained in the same letter. It did not attach any other letter from any other source.

Mr. Fox: I would ask that you might go into what constitutes a complaint.

Mr. Rogers: I think that is part of it.

Mr. Savage: And the Trial Committee Rule, and it very plainly says any complaint against an attorney shall be filed with the Director, who shall promptly notify the attorney. And in my mind, I'm trying, not trying to prejudge the issue. I'm going to read your briefs. The complaint is filed with the Bar Association and notice, not any complaint, but notice is given to the attorney.

Mr. Triplett: Again, our problem, Mr. Savage, is, in making an appropriate response, we need to see

some complaint and know what's in the complaint. Otherwise, we cannot refute it.

Mr. Rogers: Well, you can put that in your brief.

PAGES 1, 2, 3, 4 OF KENTUCKY BAR ASSOCIATION'S RESPONSE TO NOTICE FOR REVIEW

SUPREME COURT OF KENTUCKY

No. 78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

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accurately and fully informed respondent in detail of all the factual allegations of misconduct which were contained in the actual documents.

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respondent had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. An answer to the charge was timely filed by respondent on October 7, 1976. A trial committee was appointed and a hearing held on March 11, 1977. During the course of this hearing, respondent's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

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of law for a period of two years. The Board of Governors has filed an opinion in the record setting forth its findings of fact and recommendation.

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ARGUMENT

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(LETTERHEAD OF HOGAN, TAYLOR, DENZER & BENNETT)

June 21, 1976

Leslie G. Whitmer, Esq.
Kentucky Bar Association
315 West Main Street
Frankfort, KY 40601

RE: Donald M. Heavrin

Dear Mr. Whitmer:

Please treat the original and enclosures as a response to yours of June 10, 1976, addressed to Mr. Donald Heavrin. Mr. Heavrin responds as follows:

1. We question the procedure asserted in your letter of June 10, 1976, as we find no provision in the rules for the commencement of disciplinary procedure absent the filing of a sworn complaint. If indeed a complaint has been filed by the Kentucky Bar Association, please forward true copies of the minutes and resolutions authorizing the complaint and such supporting data as may be contained therein.

2. Your correspondence of June 10, 1976, fails to state or even claim that Mr. Heavrin is engaged in any improper, unprofessional or unethical conduct.

3. The facts stated in your letter of June 10, 1976, do not state a claim or states facts amounting to improper, unprofessional or unethical conduct.

4. As the Kentucky Bar Association has heretofore been advised, this entire transaction was the subject of certain litigation styled: Citizens Fidelity Bank & Trust Company v. Donald Heavrin, et al CR #174698, Jefferson Circuit Court, Chancery Branch, Second Division, and the matter was ultimately decided by the Honorable James Hubbs, presiding judge of such court. Heretofore, you have been supplied with Judge Hubbs' findings of fact, conclusions of law, and ultimate disposition of the case. During

the course of this trial, Mr. Heavrin testified in chief and also testified by deposition before the trial. Evidence was offered by Mr. Heavrin relative to the transaction with Mr. Bodenbender, relative to his statements to Ms. Maurine Collie and the two checks mentioned in the second paragraph of the second page of your letter dated June 10, 1976. The inferences to be drawn from these transactions were exhaustively argued before Judge Hubbs. After considering the transcript of evidence, numerous exhibits and having set aside all afternoon for oral argument in addition to briefs, Judge Hubbs rendered an opinion exonerating Mr. Heavrin from any wrongdoing. We adopt by reference to as if fully set forth herein all of the evidence offered by Mr. Heavrin, the entire transcript of evidence and, of course, the findings of fact and judgment of the court. After the judgment became final the Citizens Fidelity Bank and Trust Company undertook an appeal to Kentucky's highest court. Mr. Heavrin filed a cross-appeal. Thereafter, Citizens Fidelity and Mr. Heavrin reconciled their differences and the appeals were not perfected.

5. You will also remember that at all stages of the proceedings we have offered to make Mr. Heavrin's entire file available to you and this included material which would ordinarily be privileged and which I could not reveal without Mr. Heavrin's express consent. Neither you nor any member of your staff nor any member of the State or Louisville Bar contacted Mr. Heavrin or me relative to this information.

6. The judgment and finding of the Jefferson Circuit Court having considered all of the items alleged in your letter of June 10, 1976, as we stated exonerated Mr. Heavrin from any wrongdoing, it is our feeling that this judgment is res judicata and that the Kentucky Bar Association is bound by these facts and judgment. We also think the Kentucky Bar Association is estopped from proceeding because

all of the evidence which you allude has been in the record of the Jefferson Circuit Court proceedings for many months after the case was decided. We promptly advised you of this disposition.

7. To our knowledge Mr. Bodenbender has not complained of any improper conduct on the part of Mr. Heavrin. If we are incorrect about this, perhaps you would forward us any statement you have from Mr. Bodenbender which supports any claim of unprofessional conduct or impropriety. The issue of what Mr. Heavrin said to Ms. Collie was squarely before Judge Hubbs. It is quite understandable why Judge Hubbs would rule in Mr. Heavrin's favor when you consider the testimony of Citizens' vice president, Mr. Dan Ulmer. His testimony given under oath by deposition should be compared to the testimony that he gave at trial. There, of course, was a motive for Ms. Collie's testimony and it was, of course, to protect her own position.

8. We hope that you have transmitted the data we have heretofore sent you to the Inquiry Tribunal and this, of course, includes Judge Hubbs' opinion and the transcript of evidence. It would be grossly unfair to Mr. Heavrin if the Inquiry Tribunal did not have the benefit of these documents particularly when we have offered to make them available for such copying or use as you desired. If this has not been done, then the Injury Tribunal would only have a very sketchy picture of this case. We would like to be advised as to whether or not this has been done.

9. It is categorically denied that Mr. Heavrin at any time or at any place mentioned in your letter of June 10, 1976, or in your letter of August 15, 1973, engaged in improper, unprofessional or unethical conduct.

We again enclose copies of the findings of fact, conclusions of law, and opinion rendered by Judge Hubbs on September 12, 1975. We of course, make this response in triplicate, and we, of course, would like to be advised of any

action. Any other charge previously made or incorporated in the present charge is denied. This includes the statement made in your letter of August 15, 1973. We would like to refer you to page two of your letter of August 15, 1973, where you make the statement that the clients named on the checks have never received their funds. We assume that you mean the clients named on the $105,000 check and not the checks enumerated on page 2. Relative to the letter of August 15, 1973, we adopt the statements made in this correspondence as a defense to the charges contained in the letter of August 15, 1973.

We are mindful that the Inquiry Tribunal sustained our motion to defer action pending the outcome of the litigation described herein, and we are, of course, grateful for the action. This does not change our position that no improper conduct is present here.

Very truly yours,
(s) Henry A. Triplett

HAT:tlb
Enclosure

(KENTUCKY LAW SUMMARY, 2/7/79)
SUPREME COURT
Opinions Rendered, February 6, 1979

ATTORNEYS

Public Reprimand—

Ky. Bar Assn. v. *Burroughs;* In Supreme Court; Opinion and Order.

"The following decision of the Board of Governors of the Kentucky Bar Association is hereby adopted pursuant to and in conformity with SCR 3.370 (8):

'FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER OF THE BOARD OF GOVERNORS OF THE KENTUCKY BAR ASSOCIATION

'On or about December 19, 1977, the respondent, Clinton R. Burroughs, was charged with unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute, specific charges being summarized as follows:

I. Respondent entered a trust agreement with a client whereby the managed the client's funds, and failed to give an accounting.

II. Respondent commingled his personal funds with the client's funds.

III. Respondent breached his fiduciary duty to this client.

IV. Respondent misappropriated $1,651.30 of his client's funds.

'The charge was served by registered mail on December 22, 1977. Respondent filed his response on January 10, 1978. And a Trial Commissioner was appointed, conducted a hearing, and filed his report. The Report made numerous findings, but no recommendation as to guilt or innocence. The matter was considered by the Board of Governors of the Kentucky Bar Association, which makes the following Findings of Fact, Conclusions of Law, and Order.

'FINDINGS OF FACT

'The Board of Governors finds facts as follows:

'1. Respondent had represented Eugene N. Turner on various, petty matters, many of them being in Louisville Police Court, and arising from Turner's consumption of alcohol. Sometime in 1975, Turner received $20,500.00 in settlement of a claim for wrongful death of his father. Fearing that he may squander the money, Turner asked Respondent to hold $17,000.00 as Trustee, and to that end a Trust Agreement was executed. The agreement provided for investment of the corpus and invasion of corpus for Turner's

benefit in the respondent's discretion. The Agreement was revocable by Turner. It contained no provision for an accounting, but Turner and Respondent agreed orally that Respondent would account in writing as of December 31 of each year.

'2. Respondent deposited $17,000.00 as Trustee in a passbook savings account. Thereafter, Turner began a series of demand on Respondent, and Respondent disbursed funds as follows: (1) directly to Turner; (2) to one Wanda Turner, pursuant to Turner's oral authorization; and (3) to Turner's creditors.

'3. Disbursements to and for Turner were made through an account entitled "Clinton R. Burroughs, Attorney". This was Respondent's business account, through which his law practice revenue and expenses passed. Repondent would withdraw money from the Trusteed savings account, deposit it in the "attorney" account, and write checks on the attorney account for and on behalf of Turner. The transfer of funds from the savings account to the attorney account did not coincide with the checks written to and for Turner. At times, the total of the checks written to and for Turner exceeded the transfers from the savings; at times they were less than the transfer from savings. From this, the Board finds no intent to misuse the funds.

'Respondent did not consider the money in the attorney account to be his own (although he legally had title to it) until he transferred it to another "personal account". The Board finds that Respondent did not understand the workings of a trustee account for clients' money; that Respondent commingled personal funds and clients' funds, but did so with no intent to defraud.

'4. On one occasion Respondent loaned $1,651.30 of Turner's money to a client, with which to purchase a truck. Although good business precautions were not taken in respect to perfection of a security interest, the loan was repaid with interest, and the Trust Fund profited thereby. Respondent told Turner that the disbursement was to purchase a car for Wanda, which it was not. The check had been written to a car dealer. The Inquiry Tribunal found, and the Board has no reason to doubt, that Respondent forgot why he had written the check and when asked, erroneously thought that he had purchased a car for Wanda.

'5. On one occasion Respondent noted on Trust account records an investment of $3,500.00 in "XYZ Corporation". It later developed that XYZ Corporation was, in fact, Computerland, Inc.; that Respondent has shied from the investment and never withdrawn any money from the savings account for it. No explanation was given for using the fictitious name "XYZ Corporation", or for entering the investment on the Trustee account records; however, this was no misappropriation or imprudent investment. It was no investment at all.

'6. No accounting was rendered in 1975 because the number of transactions in 1975 was insignificant. In January, 1977, Respondent gave Turner an accounting for 1975 and 1976, which is accurate except for a $100.00 mistake in subtraction, and except that Respondent did not credit himself with cash payments totaling $498.98 he had made on Turner's behalf.

'7. On May 17, 1977, respondent gave Turner a check for $1000.00 marked "Final Draw". Turner knew that more money should be in the account. Ultimately, a corrected accounting was made, and $3,233.40 remained in Trust. Turner received $1,616.70 as a final distribution, and Respondent took $1,616.70 as a fee for services rendered. No complaint is made that Respondent's fee was excessive. Although the record is not clear, one gathers that Respondent's fee included charges for various legal representations as well as handling the Trust.

'CONCLUSIONS OF LAW

'The Board makes Conclusions of Law as follow:

1. Respondent did not fail to give an accounting.

2. Respondent commingled his funds and his client's funds.

3. Respondent breached no fiduciary duty to his client.

4. Respondent misappropriated no money of his client to his own use.

5. Respondent is guilty of unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute.

'DISCUSSION OF PUNISHMENT

'A majority of nine found no intention to defraud on the part of Burroughs. They considered him to be misguided, and were concerned that he did not know the mechanics of a Trustee Account. They were impressed by the exasperating nature of handling Turner's affairs. Therefore, they considered a public reprimand to be appropriate.

'Other members of the Board of Governors considered Respondent's conduct to warrant greater punishment. Particularly, they believed that the final accounting had to be dragged out of him, and there was some belief that he would have kept the final $3,200.00 if he had not been confronted.

(LETTERHEAD OF HOGAN, TAYLOR, DENZER & BENNETT)

September 12, 1975

Mr. Leslie G. Whitmer, Director
Kentucky Bar Association
Frankfort, Kentucky 40601

RE: Donald M. Heavrin

Dear Mr. Whitmer:

By letter dated September 5, 1973, you advised that the Inquiry of Tribunal agreed to defer action on the complaint

pending a determination by the Circuit Court in the lawsuit against Donald Heavrin involving substantially the same fact situation as the one presently before the Tribunal.

You requested that we advise you when judgment was re-entered. In this morning's mail we received copies of the enclosed findings fact and conclusions of law and opinion. You will note the following language. "Heavrin had nothing to do with the forgery and there was no conspiracy."

We are of the opinion that these findings completely vindicate Mr. Heavrin from any claim of unprofessional performance.

We would appreciate it if you would advise the Inquiry Tribunal of these findings and transmit copies to them. We will then request that the complaint initiated by your office against Mr. Heavrin be dismissed.

We will tender a final judgment in this case in the near future. Mr. Heavrin has authorized me to tell you that he will satisfy the $11,000.00 judgment. This last statement must be qualified to the extent that in the event Citizens Fidelity Bank and Trust Company takes an appeal, Mr. Heavrin of course will cross appeal.

We would appreciate acknowledgment that you have received this correspondence and the enclosures. Thank you for your courtesy in the premises.

Sincerely,

Henry A. Triplett

HAT:mkb
Enclosures
bcc: Mr. Don Heavrin

SUPREME COURT OF KENTUCKY

October 7, 1976

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

ANSWER

The respondent, Donald M. Heavrin, for his answer to the charge filed against him by the complainant and without waiving his right to file additional pleadings and motions, says:

(1) That the procedure employed by the complainant violates the respondent's rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in that he is denied due process of law and equal protection of the law because he does not have a trial before the Board of Governors or the Supreme Court of Kentucky and is not permitted to confront the witnesses against him before either the Board of Governors or the Supreme Court of Kentucky. He is denied equal protection of the law because there are no objective standards in determining guilt or punishment. The procedure invoked by the complainant also is in violation of Section 2 of the Bill of Rights of the Constitution of Kentucky because it permits arbitrary action. His fundamental right to counsel is also violated because neither he nor his counsel may appear before the Board of Governors and it is, of course, discretionary whether or not the Supreme Court of Kentucky will permit oral arguments should the case reach such court. Further

answer to the charge is made without waiving the contentions made in this paragraph.

(2) The charge fails to state sufficient facts or a sufficient claim which would warrant or justify disciplining the respondent.

(3) That all averments not expressly admitted are denied.

(4) That heretofore the subject matter of the charges asserted herein against the respondent were the subject of a certain action filed in the Jefferson Circuit Court, CR 174698. It was an action filed by Citizens Fidelity Bank and Trust Company against Donald M. Heavrin and others. The subject matter of this action involved the check attached to the charge marked "Exhibit A." That the defendant, Donald M. Heavrin, in this action, and the respondent herein are one and the same. That the action was allotted to the Chancery Branch, Second Division, presided over at all times material herein by the Hon. James Hubbs. That numerous depositions were taken and Judge Hubbs presided over a protracted trial. Thereafter, Judge Hubbs heard approximately two hours of oral argument by counsel for the respective parties. Thereafter, Judge Hubbs made certain findings of fact and conclusions of law relative to the claims against Heavrin, entered a judgment pursuant thereto, and overruled motions to vacate and alter. That the judgment entered by the court is final and unappealable. Judge Hubbs found, inter alia, that Mr. Heavrin had nothing to do with the forgery and was involved in no conspiracy. Attached hereto and made a part hereof as if fully copied herein is a true copy of the Findings of Fact and Conclusions of Law of Judge Hubbs opinion marked "Respondent's Exhibit 1." Accordingly, the respondent affirmatively pleads res judicata and estoppel by judgment. That before the formal charge was filed herein, respondent authorized his counsel to make available to the complainant his entire

file, and complainant through its authorized agent came to the office of respondent's counsel and studies the file for approximately 3½ hours but did not copy either the Transcript of Evidence or any of the material findings made by Judge Hubbs. Heretofore counsel for respondent had forwarded to the office of the Director of the Kentucky Bar Association copy of respondent's Exhibit 1.

(5) That at all times material herein, the respondent, Donald M. Heavrin, was acting in his capacity as a duly licensed and regularly practicing attorney within the Commonwealth of Kentucky and as such represented and is now representing James F. Donoghoe, a former member of the Kentucky Bar Association who has been permanently disbarred by order of the Court of Appeals of Kentucky. That there were civil claims and criminal charges being asserted against James F. Donoghoe and the respondent represented James F. Donoghoe ethically, faithfully, and to the best of his ability, and is now so doing. That respondent has every right and duty to vigorously and adequately represent his client as all lawyers do whether their clients are famous or obscure, innocent or guilty, rich or poor, popular or unpopular, good people or bad people, and it is immaterial for lawyer's clients' conduct to be the subject of wide notoriety and the conduct does not have public approbation.

(6) That respondent unequivocally and categorically denies any unethical or improper conduct on his part as claimed by the charge herein and further states that some of the statements contained in the charge have been conclusively refuted by the Findings of Fact, Conclusions of Law, and Opinion by Judge Hubbs.

(7) That for answers to paragraph 1 of the charge, respondent admits the first three sentences of paragraph 1 and denies the last sentence.

(8) For answer to paragraph 2 of the charge, respondent admits the first sentence of paragraph 2, denies the

second sentence, admits the third sentence, and admits the last sentence.

(9) For answer to paragraph 3 of the charge, respondent denies the averments contained therein and further says such averments violate Rule 11 of the Kentucky Rules of Civil Procedure which requires averments and allegations to be made in good faith and that the person making them have some legal or lawful basis to support them.

(10) For answer to paragraph 4 of the charge, respondent admits the first three sentences of paragraph 4, denies the fourth sentence, and admits the last sentence with the qualification that is is not clear as to whether or not the Florida attorney's signature was forged.

(11) For answer to paragraph 5 of the charge, respondent admits that he received $11,000 in cash from Citizens Fidelity Bank and Trust Company which he handed to Mr. Donoghoe. He admits the second sentence of paragraph 5, admits the third sentence, denies so much of the fourth sentence which avers that he commingled said funds with his own, and admits the last sentence of paragraph 5.

(12) For answer to paragraph 6 of the charge, respondent admits the first sentence, admits the second sentence, and categorically denies the last sentence of paragraph 6.

(13) For answer to paragraph 7 of the charge, respondent admits the first sentence therein, denies the second sentence, denies the third sentence, and admits the last sentence. That the simple answer to this averment is that if Mr. Donoghoe's check would have been good, Mr. Heavrin's check would have been good. That this transaction was testified about in great detail in the aforementioned Jefferson Circuit Court trial.

(14) That heretofore and by letter dated June 10, 1976, the Kentucky Bar Association, complainant herein, wrote Mr. Heavrin and advised him that a formal complaint had been made and he responded to this by letter dated June 21,

1976, and such response is attached hereto and made a part herein marked "Respondent's Exhibit 2."

WHEREFORE, the respondent, Donald M. Heavrin, demands:

(1) That the charge filed by the complainant herein be dismissed.

(2) That he recover all other and proper relief in the premises as the circumstances warrant and justify.

HOGAN, TAYLOR, DENZER & BENNETT
HENRY A. TRIPLETT

Attorney for Respondent

PAGES 13, 16, 17, 19, 20, 28, 32 AND 47 OF HEAVRIN'S TESTIMONY BEFORE TRIAL COMMITTEE AUGUST 30, 1977

13

I told Donoghoe, at the beginning, and I said so in the deposition and I said so at the trial, I told him, at the outset, that I didn't care who was right or wrong in the fight with the people in Pennsylvania; that I was not interested in representing him, unless he made those people whole, and that's the arrangement I had, from the first day that I ever got into the case—"I don't want to argue with the people in Pennsylvania. I want those people paid." And he said, "Fine. We'll pay them, as I make the money on these other deals."

16

Well, I said in the deposition that, anytime I've ever represented anyone in a criminal case, you always have some suspicions, and I've been suspicious of people that told me the absolute truth and I've felt very confident about people that were lying to me. I had no more suspicion about him than I would someone who walked in this afternoon and told me their version of a criminal case.

17

I don't know. See, the thing that was foremost in my mind is that I told him—suppose I thought that he was 100 percent right or 100 per cent wrong; that was totally irrelevant, because I told him that I wouldn't represent him, unless he made the people whole in Pennsylvania, and he protested about that, saying that they were breaching their agreement; that he had a specified period of time in which to pay them money and he had agreed to pay them funds, as they needed them for the day-to-day expenses, and so on. I said, "I don't care what the deal is with the people of Pennsylvania, whether you think they breached the deal or not; pay the people."

19

Then, on Monday, when the bank called me, they said, "There's a question about this endorsement." Now, these banks are shuffling everybody around, but no one has ever said anything about questions about endorsements. So, I got on the phone and I called him on the phone, and I was irate, and I was very angry, and I probably said something like, "You no good son-of-a-bitch. The bank just called me and said there's a question about this endorsement." And he said, "Give them the names of the people in Whitesville, so that they can confirm the fact that they've endorsed these checks." I put the guy in an airplane, to go there, from Kentucky Flying Service, to get the endorsements, and I said, "Jim, I've already told Dan Ulmer at the bank where he can contact these people.

20

He said, "Fine. Let them make any kind of check they want." Then, later in the day, as I testified, I called him back to give him the name of the lawyer in Florida that was also on the check and, when I called back, Ulmer's secretary said that the bank had checked the endorsements on the check and everything was perfectly all right, and then I asked her to have him call me and tell me that, because I

wanted him to tell me that everything was all right, and, at one-thirty that afternoon, the vice-president of the bank personally called me and said, "We have checked everything. The endorsements are A-Okay. We'll honor checks on that account." And I said, "Fine." And I called Donoghoe and I apologized. I said, "I'm sorry. The bank has checked everything. The endorsements are 100 percent. You can now get the money, write a check on the account and send it to the people in Whitesville." He said, "I knew everything was okay." And, you know, he was sort of laughing about my getting onto him earlier in the morning.

28

Yes, he told me he took all of his accident cases on a 50-50 basis. I was somewhat amazed by it too, because I've never taken one for higher than a third, 33⅓, but this case also had other checks in it. In other words, the settlement came in piecemeal because—I don't know—I think it was Lloyds of London, or somebody, who pays off because they have a congloremate of insurance companies that they draw on, and the money came in piecemeal, and this was not the only check in this case. This case totaled 185 thousand, or something like that, and the money was brought in in several different checks.

32

No sir. Now, I relied on his word because I thought he was telling me the truth. But, on Monday, when—no one ever said, "There's a question about these endorsements." On Monday, when they said, "There's a question about these endorsements," the bank still had all of the money except for the 11 thousand dollars, and I went down the list and told Ulmer where he could contact those people. He finally, grudgingly, admitted that on cross examination and I did everything I could, so that he could make an independent check. I don't know what else I could have done to protect the payees. Then, after the bank has, what I presumed,

called all the payees and asked them about it and they said, "Yes, everything is fine," he called me back and said, "We have personally checked." So, not only did I rely on him and believe that he was telling me the truth, Monday, while the funds were still being held by the bank, the bank conducted an investigation and I gave them as full cooperation as I could possibly give them. I don't understand what else I could do. I mean, you know, there may be something else I could have done, but I don't know what it was.

47

I know that the check, which was ultimately cashed on, I think, the 19th or sometime, was issued the 6th of June and I know that Donoghoe went various places to get the endorsements. I know that he went—I don't know—I know that we got an airplane and put him on it to go to Whitesburg, because there's no commercial flights there, and I know that he went to Florida with the check, because, after they got the check, the reason the people in Whitesburg were pressuring him was because he was having difficulty getting all these parties' signatures on the check. He had to go various places to get that done.